

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Mega Financial Services (NCT/18888/2014//57(1))

[2015] ZANCT 42 (29 October 2015)

[2015] ZANCT 42**COURT**

National Consumer Tribunal

BEFORE

D Terblanche, L Best, N Sephoti

CASE / FILE NUMBER

NCT/18888/2014//57(1)

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Source record**IN****THENATIONAL****CONSUMERTRIBUNAL****HELD****AT CENTURION****Case**

number: NCT/18888/2014157(1)
In

the matter between: NATIONAL
CREDIT
REGULATOR
APPLICANT
and
MEGA
FINANCIAL
SERVICES
RESPONDENT

CORAM: Ms

D Terblanche: Chairperson &
Presiding Member
Ms

L Best: Tribunal Member
Adv

N Sephoti: Tribunal Member
Date
of Hearing - 13 February 2015

JUDGMENT

AND REASONS

1. The Applicant is the National Credit Regulator ("the Applicant"), an organ of state within the public administration established in terms of section 12 of the National Credit Act, Act 34 of 2005 ("the NCA or "the Act").
2. The Respondent is Mega Financial Services ("the Respondent"), a company duly incorporated under the Company Laws of South Africa and a credit provider with the registration number NCRCP1977.
3. The Applicant avers that the Respondent contravened the NCA in that the Respondent
 - 3.1 Contravened section 81(2)(a) of the Act and section 81(3) read with section 80(1);
 - 3.2 Contravened section 74(6)(b) of the Act;
 - 3.3 Contravened section 91(b) of the Act read with sections 133(1) and (2);
 - 3.4 Contravened section 93(2) of the Act read with Regulation 30(1), and
 - 3.5 Contravened section 129(1), section 3(e)(iii) and Section 91 (a).
4. Though the application before the Tribunal is for de-registration of the Respondent in terms of section 57(1), the Applicant at the start of the hearing indicated that it is not seeking an order for Respondent's de-registration. Applicant submitted that at the time of preparing this application the respondent was still registered with the applicant, this state has changed in the interim and the respondent's registration lapsed.
5. Respondent has not opposed the application despite being served with the application.
6. The matter is heard by the Tribunal on a default basis. The Tribunal considered the application on the basis of the founding affidavit and the oral

submissions

made by the Applicant at the hearing. In accordance with Rule 13(5) of the Rules[1] (5) "Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted." The contents of the Applicant's founding affidavit are therefore deemed to be admitted by the Respondent.

7. The Tribunal is further satisfied that the Respondent was properly served with the Application. The Tribunal therefore proceeded with the matter on a default basis in accordance with Rule 24.

8. The brief background as alleged by the Applicant is as follows:

8.1 On 24 June 2014 the Chief Executive Officer of the Applicant authorised an investigation in terms of section 25 of the Act into

the credit practices of credit providers in the Pretoria, Silverton area, to ascertain if credit was being extended in a manner compliant with the Act and Regulations.

8.2 The said investigation was conducted on or about July 2014 by investigators authorised by the Applicant at the Respondent's premises situated at 557 Pretoria Street, Silverton, Pretoria.

8.3 During the course of the investigation, the investigators randomly selected and copied 10 consumer files which were assessed. Further to this an interview was conducted with a representative of the Respondent inter alia, Jan Kleynhans.

APPLICANT 1S SUBMISSIONS

9. The Applicant alleges that -

9.1 The Respondent contravened section 81(2) of the Act as the investigation found that the Respondent entered into credit agreements with consumers without conducting an affordability assessment. No evidence was found to show that the Respondent, as required by the Act:

9.1.1 took reasonable steps to assess the financial means, prospects and obligations of the consumers;

9.1.2 obtained information or any proof relating to the debt repayment history of consumers;

9.1.3 conducted any credit bureau checks in order to attempt to determine the debt repayment history of the consumers;

9.1.4 requested consumers to list their expenses, and the Applicant submits that the Respondent was therefore not in a position to make a proper estimate as to the expenditure of the consumers.

9.2 Further, that section 80(1)(a) clearly states that a credit agreement is reckless if at the time when a credit agreement is entered into, the credit provider failed to conduct an affordability assessment in terms of 81(2)(a). Section 81(3) expressly prohibits a credit provider from entering into reckless credit with a consumer.

9.3 In the event that it may be found that there was in fact compliance with section 81(2), the Respondent failed to comply with the contents of Regulation 55(1)(b)(vi) read with section 170 of the Act in that the Respondent failed to keep proper records of the affordability assessments.

9.4 The loan agreements of the Respondent are in contravention of section 74(6)(b) as consumers are not afforded the opportunity to elect to be included or excluded from marketing campaigns. Specifically, Clause 16 of the loan agreements states that: “unless the borrower, by written notification, notifies the respondent that he or she wishes to be excluded from the marketing practices it will be accepted that the consumer elected to be included in the mentioned marketing strategies.”

9.5 At the time of the investigation 386 bank cards were found at the premises of the Respondent. In terms of section 91(b) read with section 133(1) and (2) of the Act, credit providers are expressly prohibited from requiring or demanding that consumers give temporary and/or permanent possession of such to the credit provider.

9.6 The small credit agreements used by the Respondent do not comply with section 93(2) of the Act, as they are not in the prescribed form and do not contain the following information which is to form part of the agreement as per Regulation 30(1) as reflected in Form 20.2, namely:

9.6.1 Statement (part 5);

9.6.2 Default administration charges (part 6);

9.6.3 Early settlement (part 9);

9.6.4 Consumer's right to terminate the agreement (part 11); and

9.6.5 Statement on marketing option (part 16).

9.7 The failure of the Respondent to use the prescribed form of the agreement and to include all prescribed information in the agreement is a serious breach of the Act in that it enables the Respondent not to disclose to consumers information about their rights and obligations in terms of the Act.

9.8 Evidence was found during the investigation that the Respondent contravened sections 129(1), and 3(e)(iii) of the Act in that the Respondent resorted to enforcing credit agreements prematurely by requiring or inducing consumers to sign enforcement documents prior to default on the part of consumer. Specifically, the investigation found:

9.8.1 Acknowledgement of debt documentation signed by the consumer, as debtor, undated and with no details completed, although the consumer

is not yet in debt;

9.8.2 Undated letter of demand in terms of section 58 of the Magistrate's Court Act, yet signed by the consumer (as debtor) as having been received;

9.8.3 Undated consent to judgment agreement (in terms of sections 58 and 65(j) of the Magistrate's Court Act) yet signed by the consumer.

ANALYSIS

OF LEGAL PROVISIONS AND FACTS

10. Section 81(2)(a) and section 81(3) read with section 80(1)(a) of the Act provide as follows:

"81.Prevention of reckless credit

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-

(a) the proposed consumer's-

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt repayment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations;

(3) A credit provider must not enter into a reckless credit agreement with a prospective consumer.

80. Reckless credit.

(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4)-

(a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; ..."

11. The provisions of 81(2)(a) and section 81(3) of the Act are mandatory as is evident from the use of the word "must". The ordinary dictionary meaning ascribed to the word "must" is "to be obliged to, be compelled to do something because of a rule or law"[2].

12. In the case of Minister of Environmental Affairs and Tourism & Another v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism & Another v Smith [3] the learned judge Brand stated that

"The general principle is, of course, that the language of a predominantly imperative nature such as "must" is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction".

Further that:

"where a statute provides for the acquisition of a right or privilege as opposed to the infringement of an existing right or privilege, compliance with formalities that are prescribed for such acquisition should be regarded as imperative".

13. With reference to the above, it stands to reason that the word "must" where it appears in sections 81(2)(a) and section

81(3) of the Act is peremptory and not discretionary and that it is therefore mandatory for the Respondent to have conducted affordability assessments before granting loans to consumers. In all 10 of the randomly selected consumer files which were examined during the course of the investigation, no proof was found to substantiate that any affordability assessments were performed. This is a contravention of the Act. Further, in terms of Section 80(1)9a), these credit agreements entered into by the Respondent would thus be deemed to be reckless.

14. Section 74(6)(b) of the Act reads as follows:

"74. Negative option marketing and opting out requirements

- (6) When entering into a credit agreement, the credit provider must present to the consumer a statement of the following options and afford the consumer an opportunity to select any of those options:

...

- (b) to be excluded from any-

- (i) telemarketing campaign that may be conducted by or on behalf of the credit provider;
- (ii) marketing or customer list that may be sold or distributed by the credit provider, other than as required by this Act; or
- (iii) any mass distribution of email or sms messages.

The purpose of this section is to provide consumers with the choice to opt out of marketing activities, and the onus is on the credit

provider to enable the consumer to exercise this choice. Clause 16 of the loan agreements places the responsibility on the consumer to notify the Respondent in writing should they wish to be excluded from marketing practices. If no such notification is forthcoming, it will be accepted that the consumer elects to be included in the marketing practices. This inverts the intention the Act, which disallows the practice of negative option marketing.

15. Section 91(b) read with section 133(1) and (2) of the Act provides as follows:

"91 Supplementary requirements and documents

A credit provider must not- ...

- (b) request or demand a consumer to-
- (i) give the credit provider temporary or permanent possession of an instrument referred to in section 90(2)(Q(i) other than for the purpose of identification, or to make a copy of the instrument;

(ii) reveal any personal identification code or number contemplated in 25 section 90(2)/(/)(ii); ...,

133. Prohibited collection and enforcement practices

- (1) A credit provider must not-
 - (a) make use of any document, number or instrument referred to in section 90(2)(1) when collecting on or enforcing a credit agreement; or
 - (b) direct or permit any other person to do anything contemplated in this subsection on behalf, or as an agent, of the credit provider.
- (2) When collecting money owed by a consumer under a credit agreement or when seeking to enforce a credit agreement, a credit provider must not use or rely on, or permit any person to use or rely on, any document, instrument or contract provision referred to in section 90(2)(1). (3) A person who contravenes this section is guilty of an offence.”

The instruments referred to in section 90(2)(1) are:

"an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device.”

16. During the investigation, 386 bank cards were found at the Respondent's business premises. In all of the 10 randomly selected consumer files examined during the investigation and with whom the Respondent has entered into credit agreements, the Respondent was found to have retained the bank cards of these consumers. Irrespective of whether or not these instruments were

utilised for collection or enforcement procedures, the mere act of retaining these instruments is a contravention of the Act in terms of section 91(b)(i).

17. Section 93(2) of the Act read with Regulation 30(1) provides that:

“93. Form of credit agreements

- (2) A document that records a small credit agreement must be in the prescribed form.”

Regulation 30(1) states that a document that records a small credit agreement must contain all the information listed in Form 20.2 of the Act. The small credit agreement used by the respondent did not comply with the Act, both in form and in substance. Firstly the agreements examined during the investigation and submitted to the Tribunal by the Applicant were not in the prescribed form, Form 20.2, and secondly, as submitted by the Applicant, the agreements did not contain five of the categories of prescribed information. These constitute serious omissions.

18. Section 129(1), section 3(e)(iii) and section 91 (a) provide as follows:

"129. Required procedures before debt enforcement

- (1) If the consumer is in default under a credit agreement, the credit provider-

- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
- (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
 - (i) first providing notice to the consumer, as contemplated in paragraph {a), or in section 86(10), as the case may be; and
 - (ii) meeting any further requirements set out in section 130.

91. Supplementary requirements and documents A credit provider must not

- (a) directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement;

In the consumer files examined during the investigation, evidence was found of documentation that demonstrates that the Respondent laid the basis for premature and unlawful enforcement of credit agreements by the respondent. Despite the fact that the Respondent had neither provided notice to the consumers of intention to commence nor actually commenced legal proceedings against the consumers whose files were examined, the files contained documents that had been signed by the consumers but which were undated and with detail yet to be reflected. These documents are acknowledgement of debt; a letter of demand as signed by the consumer as being received; and a consent to judgment. These supplementary agreements, if they were to form part of a credit agreement, would render the credit agreement unlawful. Further, these supplementary agreements themselves are unlawful, as they induced the consumers to sign an undertaking, allowing for the advanced enforcement of the credit agreement, even before in default. This is not sanctioned in terms of the Act. In acting in such a manner the Respondent is in contravention of Section 129(1), Section 91(a), read with Section 92(k)(3) and Section 92 of the Act.

These business practices of the Respondent further contradict the Purpose of Act, as set out in section 3, which states: The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by- ...

- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by- ...
- (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;"

Insisting that consumers sign undated and as-yet-completed documents related to the possible commencement of future legal processes, is patently unfair, and is intimidatory and deceptive.

19. The above therefore constitute contraventions of the NCA and prohibited conduct as defined in the NCA[4].
20. We accordingly find that the Respondent -
 - 20.1 Contravened section 81(2){a} of the Act and section 81(3) read with section 80(1);
 - 20.2 Contravened section 74{6}(b) of the Act;
 - 20.3 Contravened section 91{b} of the Act read with sections 133(1) and (2);
 - 20.4 Contravened section 93{2} of the Act read with Regulation 30(1), and
 - 20.5 Contravened section 129(1), section 3(e)(iii) and Section 91(a).

RELIEF

21. At the hearing, the Applicant amended their prayers as per the papers, and requested the Tribunal to order the following relief:

21.1 In terms of section 150(a) declaring as prohibited conduct the repeated contraventions of:

21.1.1. section 81(2)(a) of the Act and section 81(3) read with section 80(1);

21.1.2. section 74(6)(b) of the Act;

21.1.3. section 91(b) of the Act read with sections 133(1) and (2);

21.1.4. section 93(2) of the Act read with Regulation 30(1), and

21.1.5. section 129(1), section 3(e)(iii) and Section 91(a).

21.2 Imposing an administration fine of one million Rands against the Respondent in terms of section 151 of the Act.

22. The Tribunal's power to impose an administrative penalty is derived from Section 151(1) of the NCA. Section 151(2) of the NCA provides that:-

"(2) An administrative fine imposed in terms of the Act may not exceed the greater of -

- (a) 10 per cent of the respondent 's annual turnover during the preceding financial year; or
- (b) R1 000 000"

23. The Respondent failed to submit financial statements to the Applicant during the course of conducting business and the Respondent's

registration with the Applicant as a credit provider has subsequently lapsed. The Applicant could not put any evidence before the Tribunal on the Respondent's annual turn-over it being unknown to the Applicant.

24. The Applicant relied on the National Credit Regulator vs Werlan Cash Loans Judgment (NCT/3867/2010/57(1)(P) to argue that because the Applicant does not have that information it should not be a deterrent to the Tribunal imposing an administrative fine as it would cause a party to simply hide their financial position to avoid administrative fines being imposed. This Judgment ruled that:

“the Tribunal may impose an administrative penalty without reference to annual turnover, including to reference to annual turnover for comparator purposes. Accordingly, where no evidence regarding annual turnover is available, the Tribunal still has the option to award a penalty not exceeding R 1000 000.00”.

25. The Applicant relies further on the National Credit Regulator vs Werlan Cash Loans Judgment to contend that in the absence of the ability to calculate the 10% of turn- over, the Tribunal should resort to the alternative of a one million rand fine.

26. However, the National Credit Regulator vs Werlan Cash Loans Judgment is explicit that:

"When determining an amount, the Tribunal must consider the legislation from which its own mandate's derives and consider the factors listed in Section 151(3) which provides as follows:

When determining an appropriate fine the Tribunal must consider the following factors:

26.1 The nature, duration, gravity and extent of the contravention;

26.2 Any loss or damage suffered as a result of the contravention

26.3 The behaviour of the respondent;

26.4 The market circumstances in which the contravention took place;

26.5 The level of profit derived from contravention ;

26.6 The degree to which the respondent has co-operate with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008 and the Tribunal ; and

26.7 Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be."

Section 13>51 of the NCA does not provide guidance about where the Tribunal should start in making a determination of the amount and what weight to ascribe to each of the factors listed. It does however clearly mandate the Tribunal to consider the factors laid down and set an upper cap on the administrative fine that may not be exceeded. In these circumstances and where the Respondent's annual turnover and financial position is unknown the Tribunal considered the amount of R1 000 000, 00 referenced in section 151(2)(b) of the NCA as its point of departure (as it

would have considered 10% of annual turnover in section 151(2)(a) of the NCA as its point of departure had the Respondent's annual turnover been known) and then applied the factors set out in section 151(3) of the NCA to same.

27. The Tribunal thus proceeded to consider each of the factors listed in Section 151(3).

200% ">28. The nature, duration, gravity and extent of the contravention

From the evidence placed before the Tribunal it is clear that the contraventions of the Act by the Respondent are numerous and of a very serious nature. Furthermore, these took place at least from 2013 until the investigation in 2014, but in all probability since the Respondent's registration as a credit provider in January 2008, because relying on inference, it is unlikely that the Respondent would not have had a reason to first comply and later reverse this and decide to no longer comply. These specific facts can have an aggravating impact on the amount of the penalty imposed by the Tribunal.

29. Any loss or damage suffered as a result of the contravention

No evidence is placed before the Tribunal on loss or damages suffered as a result of the contravention.

30. The behaviour of the respondent

The Tribunal considered that the Respondent co-operated with the investigation but did not respond to the papers served in relation to this application. Furthermore, that the Respondent did not submit any financial statements as required by the Conditions of Registration during the entire period of registration as a credit provider with the Applicant.

31. The market circumstances in which the contravention took place No submissions were made in this regard by the Applicant.

32. The level of profit derived from contravention

No submissions were made by the Applicant in this respect.

33. The degree to which the respondent has co-operated with the National Credit Regulator and the Tribunal.

It was submitted that the Respondent offered co-operation with the Applicant during the investigation.

34. Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act >2008, as the case may be

The Respondent had not been found to be in contravention of the Act previously by the Applicant. There is no evidence before the Tribunal that the Respondent had been found guilty by the Tribunal or a court.

35. In light of the fact that the nature, duration and gravity of the contraventions are very serious, and in one instance clearly aimed to deceive or at least contrived to mislead consumers, and particularly that the extent stretches across contraventions of a number of sections of the Act. Further that the behaviour of the Respondent showed lack of compliance with reporting requirements of the Applicant, the Tribunal is of the view that an administrative fine of R 500 000,00 reflects the seriousness with which the Tribunal views this type of prohibited conduct and disregard of the Act by a market participant.

36. In the result the Tribunal makes the following order:

36.1 in terms of Section 150(a) declaring as prohibited conduct the repeated contraventions of:

36.1.1. section 81(2)(a) of the Act and section 81(3) read with section 80(1);

36.1.2. section 74(6)(b) of the Act;

36.1.3. section 91(b) of the Act read with sections 133(1) and (2);

36.1.4. section 93(2) of the Act read with Regulation 30(1), and

36.1.5. section 129(1), section 3(e)(iii) and Section 91(a).

36.2 Ordering that Respondent pays an administrative fine of R 500 000, 00 by no later than 30 January 2016.

DATED THIS 29^h DAY OF OCTOBER 2015

[signed]

D Terblanche, Presiding Member

Ms L Best (Member) and Adv Sephoti (Member) concurring.

[1] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No.30225)

[2] Oxford English Dictionary 2nd edition at page 494.

[3] (2003] 4 All SA 1(SCA).

[4] prohibited conduct' is defined in section 1 of the NCA as an act or omission in contravention of this Act, other than an act or omission that constitute an offence under the Act, by - an unregistered person who is required to be registered to engage in such an act; or a credit provider, credit bureau or debt counselor. Section 1 of the NCA

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